SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 785

CHENG FU SHENG and
LIN FU MEI, *Petitioners*

v.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which sustains orders of the Board of Immigration Appeals denying applications by the petitioners to suspend their deportation from the United States, or alternatively, to withhold their deportation to Taiwan.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is set forth at pages A-1 - A-2 of Appendix A. The relevant opinions of the Board of Immigration Appeals are set forth at pages C-1 - C-16 of Appendix C.

JURISDICTION

The judgments of the Court of Appeals were entered on September 3, 1968 (Appendix B, pp. B-1 - B-2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the scope of review of discretionary decisions involving the suspension or withholding of deportation includes judicial scrutiny of the criteria upon which the discretion is exercised.
2. Whether in determining the existence of "extreme hardship" to an alien for the purpose of granting suspension of deportation, it is appropriate to exclude from consideration those hardships which derive from political factors.
3. Whether in determining eligibility for suspension of deportation, it is a proper exercise of discretion to impose additional conditions upon aliens who have entered the United States under the Mutual Defense Assistance Program.
4. Whether "prosecution for military desertion" may not be a proper basis for a claim of "persecution on account of political opinion" when the desertion is shown to have arisen from political opposition to the government in power, when the evidence before the officer delegated to make the decision overwhelmingly establishes that such government confines political opponents to concentration camps and subjects them to indeterminate

sentences, shooting, and other forms of terror, and when the claimed deserters are also likely to be charged with sedition and treasonable statements.

5. Whether in exercising discretion to withhold deportation when "in the opinion" of the Attorney General (8 U.S.C. 1253(h)) an alien would be subject to persecution, relief may be denied without an expressed opinion upon the issue of persecution.

STATUTES INVOLVED

Section 243(h) of the Immigration and Nationality Act, as amended (8 U.S.C. 1253(h)), provides:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Section 244 of the Immigration and Nationality Act, as amended (8 U.S.C. 1254), provides in pertinent part, as follows:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> "(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or

to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;"

STATEMENT

Cheng Fu Sheng

Petitioner, Cheng Fu Sheng, is a native and citizen of China who was admitted to the United States in June, 1952 as a nonimmigrant official of a foreign government, being then a captain in the Chinese Nationalist Air Force, for purposes of advanced military training. He resigned his commission in October, 1952, when his military unit returned to Taiwan, and because he has remained in the United States since, he has become deportable. In subsequent deportation proceedings, petitioner applied for two remedies available to relieve him from deportation, the first being a suspension of his order of deportation which, upon approval, would result in a change of his status to that of an alien lawfully admitted for permanent residence; the second, more limited, being the withholding of his deportation to Taiwan. (R. 2)

During the series of hearings held on the applications, petitioner testified that he could not support the "Chiang Kai Shek regime" because it is a "dictatorship" and a "police state"; that he had made critical statements in public regarding the Chinese Nationalist government which were thereafter reported to his superior officers in Taiwan; that following an earlier tour of duty in the United States, which ended in 1946, he had developed a commitment to a system of democratic government, such that he was willing to "fight for democracy", and that while in Taiwan in 1949, he had attempted to enlist in the United States Air Force. (R. 21-22, 29-38)

Substantial evidence was adduced that if the petitioner were deported to Taiwan, he would be treated as a "political defector"; that the Chinese Nationalist government is a "highly organized autocratic government . . . with a limited view of personal liberties"; that petitioner would be taken

into custody by the Taiwan Garrison Command and would be charged with desertion and quite likely also with sedition and treasonable statements . . . with his trial being conducted in secret. Possibly he would be shot or given considerable time in jail and perhaps be sent to Green Island, a term applied to an island where persons suspected, and sometimes convicted, of political crimes are sent for "rehabilitation". If he survived the Green Island experience and were released, he would nonetheless be suspect and would be precluded from any public employment and would have a difficult time existing because of the political pressures brought to deny even private employment to such persons. (R. 21-22, 41-52)

The testimony given was based upon the experiences of other persons who had made critical statements in public regarding the Chiang Kai Shek government and persons who were regarded as "defectors". A "host" of such persons had been tried in secret and condemned to confinement, including the godfather of the petitioner. (R. 29-52)

The evidence in rebuttal consists solely of two documents, the first a letter by the Consul General of China at San Francisco (Exhibit 18, R. 414) which stated that the petitioner would be prosecuted only for desertion in accordance with the Criminal Code governing military personnel and would be subject to a maximum sentence of three years, and the second, a letter by an official of the United States State Department (Exhibit 27, R. 60) which stated that "on the basis of information available to it, it was not considered likely that the [petitioner] would be subject to persecution if deported to Taiwan but might be subject to prosecution for desertion".

At a stage during the administrative proceedings prior to receiving the State Department letter, but after receipt of the letter from the Chinese Consul General, the Special Inquiry Officer entered a decision in which he held that petitioner

> ". . . probably faces severe treatment upon his return to Formosa as a consequence of his criticism of the Chiang Kai Shek regime. Nevertheless, because of

> the purpose for which [. . he . .] came to the United States and his subsequent act of desertion, it would not only be incongruous, in my judgment, but would be an abuse of the discretion vested by the Congress in the Attorney General and delegated to me to grant permanent resident status to the [petitioner], or to withhold temporarily his deportation to his country on the ground that he would be subject to physical persecution there because of his attitude toward and criticism of the very government with which the foreign policy making arm of our government has allied us. I shall deny, accordingly, in the exercise of discretion, the [petitioner's] applications for suspension of deportation and temporary withholding of his deportation to the Republic of China on Formosa" (R. 144).

In a subsequent decision[1], entered after additional testimony in support of the petitioner's claim and the introduction, over objection for failure to permit cross-examination, of the State Department letter, the Special Inquiry Officer adhered to his previous decision:

> "Having carefully considered all of the evidence before me, I see no reason to change my October 30, 1964 order denying the respondent's Section 243(h) application. The United States and the Republic of China (on Formosa) have had for many years a Mutual Defense Assistance Program whereby we have given considerable material aid to the Nationalist Government and have trained many of its military personnel . . . . To grant his request would in my judgment be inconsistent with our Mutual Defense Assistance Program with Nationalist China and hence with our national interest. In the absence of the most compelling equities in the respondent's favor, our national interest should not be subordinated to his conduct in derogation thereof.

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[1] The hearings had been reopened because of the deletion of the requirement in 8 U.S.C. 1253(h) that the persecution by "physical". See 79 Stat. 918, 8 U.S.C. 1253(h), as amended.

> As there are no equities in this case sufficient to override our national interest, the respondent's application for temporary withholding of his deportation to Formosa . . . is denied in the exercise of discretion. For the same reason, his application for suspension of deportation is denied in the exercise of discretion." (R. 23-24)

Petitioner requested a "specific finding" whether he would be subject to persecution, but the special inquiry officer declined upon the basis of a prior ruling by the Board of Immigration Appeals that such findings are not required when applications for discretionary relief are denied. (R. 24-25)

The Board of Immigration Appeals affirmed the order of the special inquiry officer stating its express agreement with his decision "that it would be inconsistent with the purpose of [the Mutual Defense Assistance Program with Nationalist China] to grant relief in respondent's case". (App. C-9) The Board also found no error in the refusal of the special inquiry officer to express an "opinion" on the issue of persecution (*ibid.*). Upon a subsequent motion by the Immigration and Naturalization Service to "clarify the scope" of its decision (Supp. R. 19-20), the Board entered a supplemental decision in which it elaborated upon its previous holding. It held, relying upon an earlier decision in the administrative proceedings, that the fact that the petitioner had "expressed political views which were not looked upon with favor by the Nationalist Government of China . . . . bore no relation to a determination of "extreme hardship" for purposes of suspending deportation and that "the evidence concerned with the respondent's economic well-being did not support a claim that his return to Formosa would result in extreme hardship to him within the meaning of the statute". The Board "concluded that there were no substantial equities" in the petitioner's case "other than those arising from the fact that he refused to return to the country of his nationality after completing the program of military training for which he entered the United States", and that he was

therefore "statutorily ineligible for suspension of deportation". (App. C-1 - C-3)

The Board also held, as to the petitioner's claim for a withholding of deportation to Taiwan upon the ground of political persecution, that the "permissive language" of Section 243(h) of the Immigration and Nationality Act "meant that the Attorney General or a delegate might consider factors other than those directly relating to an alien's claim of persecution in forming an opinion as to whether discretion should be exercised in favor of, or contrary to, the applicant's application for relief. Upon a full consideration of all the evidence, including a claim that the respondents would be punished as defectors, which was refuted [sic] by evidence presented by the Service from the State Department that it was not considered likely that the respondents would be subject to persecution if deported to Taiwan but might be subject to legal prosecution for violation of the Armed Forces Criminal Code of the Republic of China, we held that upon the merits and as a matter of discretion the respondents had not made a case of persecution within the meaning of Section 243(h) . . . ." The Board also "found no error as a matter of law that the special inquiry officer's decision rested to some degree upon a political consideration, namely, the foreign policy of the United States.". (App. C-4 - C-5)

Petitioner thereafter filed a petition for review of the order of deportation against him pursuant to the provisions of Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a (R.). In a per curiam decision, the Court of Appeals, relying upon its earlier decisions in *Kasravi v. INS*, ___ F.2d ___ (July 23, 1968) (Appendix D) and *Hosseinmardi v. INS*, 391 U.S. 914, held that the record sustains the holding of the Board of Immigration Appeals and affirmed its decision. (Appendix A, pp. A-1 - A-2)

Lin Fu Mei

The relevant facts regarding petitioner, Lin Fu Mei, are similar to those relating to petitioner, Cheng Fu Sheng, and, with one difference, not in issue here,[2] the administrative decisions in his proceedings were virtually identical. The court below rendered one opinion which embraced both cases as though one. (Appendix A, pp. A-1 - A-2; C-1.- C-16)

REASONS FOR GRANTING THE WRIT

I. The decision below presents important questions affecting the exercise of discretion by the Immigration and Naturalization Service in relieving deportable aliens from deportation from the United States.

The first relates to the scope of judicial review of such decisions. The petitioners' claim of "extreme hardship" in seeking the suspension of their deportation under 8 U.S.C. 1254(a)(1) and their claim of "persecution" in seeking the withholding of their deportation to Taiwan under 8 U.S.C. 1253(h), were each based upon a showing of "what a foreign country is likely to do" (*United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 394 (2nd Cir. 1953). In this circumstance, the court below, "adopted the rule laid down" in *Dolenz* in which it was held that "the very nature of the decision which he [the Attorney General] must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude". See *Kasravi v. INS*, ___ F.2d ___ (9th Cir., July 23, 1968) (Appendix D) which the decision below invoked as authority

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[2]Petitioner, who is married to a citizen of the United States, had been granted an adjustment of status to that of a permanent resident pursuant to 8 U.S.C. 1255 at a time when his wife had been confined to a hospital for the mentally ill. When subsequent evidence established that his wife eloped from the hospital and that the petitioner had neither seen nor heard from his wife since the elopement, a period of two and a half years at the time of the administrative hearing, the grant of permanent residence was set aside. (R. 3-4)

in holding that the record sustains the denial of discretionary relief.[3]

Although the Ninth Circuit noted in *Kasravi* that "a court may surely intervene where there is an abuse of discretion, lack of procedural due process, or where a finding required by the statute is unsupported by reasonable, substantial, or probative evidence" *ibid.*, fn. 3, its citation from *Dolenz* refers only to a denial of an opportunity to present and a refusal to consider evidence offered by the alien, a far more limited basis for review. Thus, the effect of the holding below, where a challenge of the administrative criteria is presented, is to deny judicial scrutiny of the standards relied upon by the Attorney General.

This view of the rule in *Dolenz*, however, has been undermined in the Second Circuit by its later holding in *Sovich v. Esperdy*, 319 F.2d 21 (1963), which held that the "standard employed by the Attorney General's delegates" is subject to review, a ruling which the Third Circuit had previously adopted in *Dunat v. Hurney*, 297 F.2d 744, 746 (1961), and appears never to have been the intent of the Second Circuit. See *Kaloudis v. Shaughnessy*, 180 F.2d 488, 490, 491 (2d Cir. 1950), in which it was said that although suspension of deportation is a "matter of grace", "a court could say that the Attorney General had transgressed the statute", if it "affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant".

See also *Milutin v. Bouchard*, 370 U.S. 292 (1961), and the Memorandum for the Respondent there, No. 782, O.T. 1961, which indicates a substantial limitation of the basis

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[3] As if to underscore its unwillingness to intrude in even the "hardest cases" the Ninth Circuit in *Kasravi* characterized the "only evidence offered in opposition" to the applications for discretionary relief, as a "perfunctory letter written by a State Department official . . . [which] . . . not only lack[s] persuasiveness, but . . . do[es] not carry the guarantees of reliability which the law demands of admissible evidence." __ F.2d __ (Appendix D, p. D-3).

which formed the predicate for the language in *Dolenz* which appears to limit judicial examination of the Attorney General's exercise of discretion, i.e. the reliance upon confidential information without a finding that its disclosure would be prejudicial to the interests of the United States. Memorandum for the Respondent, *Milutin v. Bouchard,* No. 782, O.T. 1961, p. 9.

The interpretation which the Ninth Circuit has placed upon the Second Circuit's holding in *Dolenz* thus is not only in conflict with the Second and Third Circuits, but, in the absence here of reliance upon confidential information, not warranted by the administrative procedures which came into effect after *Milutin.*

Apart from the divergent approaches which have resulted from the language in *Dolenz* (see also *Chao-Ling Wang v. Pilliod,* 285 F.2d 517 (7th Cir. 1960), and *Batistic v. Pilliod,* 286 F.2d 268 (7th Cir. 1961)), the analysis of justiciable questions in *Baker v. Carr,* 369 U.S. 186, 211 (1961), suggests that the application of the *Dolenz* citation, with its heavy reliance upon *Chicago & Southern Air Lines, Inc. v. Waterman Corp.,* 333 U.S. 103 (1947), to all cases involving claims of political persecution may be too "sweeping". "Our cases in this field" [touching foreign relations], Mr. Justice Brennan observed there, "seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

With these determinants, there can be little question that the scope of review which the Ninth Circuit applied to the administrative decisions here was more limited than need be. Judicial action applied to the suspension or the withholding of the deportation of an alien is of no different character than such action applied to the order of deportation itself and no more intrusive in the conduct of foreign

policy than the review of extradition matters, each familiar judicial grist.

The propriety, indeed the need, for judicial evaluation of the exercise of the discretion vested in the Attorney General by the Congress is underscored here by the "management" which "the political branch" has given to the function.

In *Matter of Liao*, 11 I&N Dec. 113 (Int. Dec. 1446), which was regarded administratively as "on all fours" with the present cases and which therefore controlled the decisions below (Supp. R. 4 and R. 3), the Board of Immigration Appeals held, in response to the contention that "neither the statute nor the pertinent regulations suggest that any factor other than those concerned with physical persecution may be considered in arriving at a decision on any application under Section 243(h)":

> "We find nothing in the statute or the regulations that limits the special inquiry officer in the exercise of his discretion . . . . The Attorney General or his delegate has wide latitude and the primary consideration is whether the Attorney General or his delegate has exercised his discretion and whether there has been an error of law in the proceeding. We find no error as a matter of law that the special inquiry officer's decision rests to some degree on a political consideration, namely, the foreign policy of the United States." *Ibid.*, 11 I&N Dec. at 118.

In pursuance of such a policy, the Attorney General, as here, has almost invariably denied a withholding of deportation, where substantial claims of persecution have been made, to aliens from those countries whose foreign policies are linked with what is conceived to be the foreign policy of the United States. See *Sang Ryup Park v. Barber*, 107 F. Supp. 603 (N.D. Calif., 1952); 107 F. Supp. 605 (N.D. Calif., 1952); and *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955), as to South Korea; *United States ex rel. Watts v. Shaughnessy*, 107 F. Supp. 613 (S.D. N.Y. 1952), as to Spain; *United States ex rel. Paschalidis v. District Director of Immigration*, 143 F. Supp. 310 (S.D. N.Y. 1956), as to

Greece; *Obrenovic v. Pilliod*, 282 F.2d 874 (7th Cir. 1960); *Dunat v. Hurney*, 297 F.2d 744 (3rd Cir. 1961); *Sovich v. Esperdy*, 319 F.2d 21 (1963), as to Yugoslavia[4]; *Kasravi v. Immigration and Naturalization Service*, ___ F.2d ___ (9th Cir. 1968) (Appendix D) as to Iran; *Matter of Tan*, Int. Dec. 1825, as to Indonesia; and *Matter of Liao*, 11 I&N Dec. 113, as to Nationalist China. *Cf. Matter of Janus and Janusk*, Int. Dec. 1900, reversing decision of Special Inquiry Officer regarding illegal departure from Czechoslovakia, decided July 25, 1968.

The management of discretion has been such that the Committee on Legal Problems of Asylum of the American Branch of the International Law Association recently reported ". . . the conclusion cannot be avoided that the continued rigorous interpretation of Section 243(h) does not seem consonant with the objectives of Congress in modifying this section of the law in 1965 nor entirely compatible with the broadly humanitarian policies of the United States designed to alleviate the condition of politically oppressed persons . . ." Annual Report, 1968, p. 47.

Petitioners urge that three factors suggested above are compelling considerations to warrant review of the decision below, (1) the confusion which has existed among the

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[4]A clue to foreign policy considerations which have affected even the control of travel by United States citizens is contained in the testimony of the Acting Administrator, Bureau of Security and Consular Affairs, State Department, on S. 3243, 89th Cong., 2d Sess., providing for travel controls, Senate Committee on the Judiciary, May 18, 1966. Responding to a question why travel restrictions are imposed for Albania, he said:

> "Would you like to try another country, Senator Kennedy? (Laughter) That one is pretty thin. As we all know, Albania's foreign policy is very closely allied with that of Communist China. It is an enemy, not only of the United States, but of any liberalizing movements in the Communist world. If we treat Albania with the same consideration that we treat the more liberal Communist countries it may be a very difficult thing for the more liberal Communist countries to understand. That is the basic reason." Hearings, p. 44.

lower courts as to whether the scope of review is limited to assuring that the alien can present his evidence and have it considered, as *Dolenz* and other decisions have indicated (*United States ex rel. Moon v. Shaughnessy,* 218 F.2d 316 (2nd Cir. 1954); *United States ex rel. Cantisini v. Holton,* 248 F.2d 737 (7th Cir. 1957); or whether it extends to a review of the administrative criteria relied upon in the exercise of discretion, as *Dunat* and *Sovich* have held; (2) the impact which deportation may have for aliens who are expelled to countries where persecution upon racial, political, or religious grounds is extant and the lurking constitutional questions posed by the procedures in effecting such deportation (see *United States ex rel. Fong Foo v. Shaughnessy,* 234 F.2d 715, Motion for Stay, Frank, J. (2nd Cir. 1955); (3) and the substantial question whether in the exercise of his discretion, the Attorney General has been "actuated by considerations that Congress could not have intended to make relevant".[5] *Kaloudis v. Shaughnessy,* op. cit., 180 F.2d 488, 491 (2nd Cir. 1950).

II. A consideration of the specific forms of discretionary relief indicate additional reasons to warrant review of the decision below by this court.

Suspension of deportation

The denial of the petitioners' applications for suspension of deportation was based upon an administrative ruling that they were "statutorily ineligible . . ." (Supp. R. 3). This de-

[5] In earlier proceedings, petitioners had established that they were unable to return either to China or to Taiwan "because of fear of persecution on account of political opinion" (see *Cheng Fu Sheng and Lin Fu Mei v. Barber,* 269 F.2d 497 (9th Cir. 1959), but the House of Representatives disapproved the grant of permanent residence because it did not believe that the Refugee Relief Act involved, 67 Stat. 403, 50 U.S.C.A. Appendix 1971(d) should encompass either military personnel who have entered the United States under the Mutual Defense Program or nationals of allies of the United States. (R. 138-139) The considerations which underlie that statute are, of course, different from those here. (R. 136, Ex. 11)

cision was reached upon a doctrine that the "political aspect" of the cases, i.e. petitioner's claims that they would be placed under surveillance, jailed, denied employment, and otherwise harassed because of their political views "bore no relation to a determination of 'extreme hardship' under Section 244 (a)(1)" (Supp. R. 3). See also *Matter of Liao*, 11 I&N Dec. 113.

Two facets of this ruling pose questions. First, the determinations of the Attorney General as to statutory eligibility have always been held to be questions of law which, even in cases involving the exercise of discretion, are subject to examination by the courts. See *McGrath v. Kristensen*, 340 U.S. 162 (1950); *Ceballos v. Shaughnessy*, 352 U.S. 599 (1957); *Dessalernos v. Savoretti*, 356 U.S. 269 (1958); *United States ex rel. Hintopolous v. Shaughnessy*, 353 U.S. 72 (1957). See also as to Section 243(h) determinations, *Dunat v. Hurney*, 297 F.2d 774 (3rd Cir. 1961); and *Sovich v. Esperdy*, 319 F.2d 21 (2nd Cir. 1963). The view that hardships which derive from political behavior are not cognizable under 8 U.S.C. 1254 seems patently wrong. If wrong, the administrative decision is as much subject to judicial correction as the definition of "physical persecution" in 8 U.S.C. 1253(h) in *Dunat*, op. cit. and *Sovich*, op. cit., and the determination of eligibility to citizenship in *McGrath v. Kristensen*, op. cit.

Second, the administrative holding, sustained by the court below, that aliens who have entered the United States under the Mutual Defense Assistance Program, unlike other aliens, must meet the additional criterion of having "the most appealing equities" (R. 3) is in conflict with the view of the Second Circuit in *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2nd Cir. 1950). A similar administrative policy toward deportable aliens who had entered the United States "solely because of reasons connected with the war" during World War II, "but to be administered in such a manner as not to bring about harsh consequences" (at 1002) was reversed there upon the ground that it was a refusal upon

an arbitrary basis to exercise discretion upon the individual merits of the case.

Withholding of deportation

A further question is raised by the administrative holdings and their affirmance below that a prosecution under the Armed Forces Criminal Code for the Republic of China cannot bottom a claim of "persecution on account of political opinion" within the meaning of 8 U.S.C. 1253(h). See the dictum of Judge Learned Hand in *United States ex rel. Gilleti v. Commissioner of Immigration,* 35 F.2d 687, 688 (2nd Cir. 1929), in which he observed in a case involving a conviction for second degree assault "It has been our traditional policy from the outset not to assist in the prosecution of political offenses, and it would seem a corollary that, when the choice is open, we should not make it an incident of our own laws that the offender should be subjected to the discipline of another country for crimes of that character".

While the Seventh Circuit, assuming a prosecution for a "refusal [by Chinese Air Force officers] to return to Formosa", has held that prosecution before a military tribunal convened pursuant to the laws of a foreign state cannot be construed to be physical persecution" (*Chao-Ling Wang v. Pilliod,* 285 F.2d 517, 520 (7th Cir. 1960)), the Second Circuit in *Sovich v. Esperdy,* 319 F.2d 21, 29 (2nd Cir. 1963), reversed a ruling by the Attorney General that imprisonment for "illegal departure [from Yugoslavia] may never constitute 'physical persecution' within the purview of Section 243(h)", and suggested that there could be circumstances in which prosecution for military offenses might similarly constitute persecution.

Desertion in itself would appear to be a political offense inasmuch as the obligation to perform military service is political in nature, *Selective Draft Law Cases,* 245 U.S. 366, 390 (1917), and *United States v. Schwimmer,* 279 U.S. 644, 650 (1928). It has always been treated as such an offense

by the various extradition treaties. See Treaty of Extradition between the United States and Mexico, 31 Stat. 1818, 1822, Article IV; VI Hackworth, Digest of International Law, Sec. 578 (1943). Especially where, as here, petitioners' conduct arises from political considerations, both administrative and judicial holdings indicate that any violation of law[6] is to be regarded as a political offense rather than a purely military violation. Thus the term "offenses purely political" in the second proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874, 8 U.S.C. 136(e) has encompassed such offenses as assassination of a provincial governor by a "member of a secret revolutionary society" (S——Case, 53956/88; 2304 C-222932); the assassination of an Austrian Prime Minister (A——Case, A-4944576); perjury and attempted fraud by Jews in Nazi Germany (39 Op. Atty. Gen. 59 (1938); 1 I&N Dec. 47). See also Matter of K, 4 I&N Dec. 108, 116-118.

A similar construction has been given to extradition treaties. See *Karadzole v. Arkutovic,* 247 F.2d 198, vacated on other grounds, 355 U.S. 393 (1958); *In re Ezeta,* 62 F. Supp. 995 (D.C. N.D. Calif., 1894); *Ramos v. Diaz,* 179 F. Supp. 459 (S.D. Fla., 1959); Deere, Political Offenses in the Law and Practice of Extradition, 27 Am. J. Int. Law, 247-270 (1933); Garcia-Mora, Present Status of Political Offenses, 14 U. Pitt. L. Rev. 371-394 (1953); Evans, Reflections Upon the Political Offense in International Practice, 57 Am. J. Int. Law 1-24 (1963)

In the light of the substantial question raised by the issue whether a military desertion by a political opponent of a repressive regime is a "political offense", the holding by the Seventh Circuit in *Chao-Ling Wang v. Pilliod,* 285 F.2d 517, 520 (7th Cir. 1960), adopted here by the Attorney General (R. 5), does not seem dispositive of the issue.

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[6] Although Petitioner, Lin Fu Mei, is said on the record to have "deserted", the record indicates as to Petitioner, Cheng Fu Sheng, that his separation from the Chinese Nationalist Air Forces was a "resignation" (R. 2).

III. A further and a substantial issue is also raised by the decision below in view of the refusal of the administrative agency to make findings or to form an opinion upon the issue whether the petitioner would be "subject to persecution on account of . . . political opinion". 8 U.S.C. 1253 (h).[7] (R. 4)

The view of the Attorney General that neither an "opinion" nor findings are required in the exercise of a discretionary function is not supportable by an analysis of this Court's decisions regarding administrative review. Apart from the purpose which findings may have where statutes require substantial evidence to support the administrative decision, this Court has repeatedly insisted upon the determinations and findings, however denominated, which statutes contemplate.

Thus in *Cole v. Young,* 351 U.S. 536 (1955), in construing a statute which vested "absolute discretion" in certain heads of government departments to suspend employees in the "interest of national security" (351 U.S. at 538, fn. 1) this Court held invalid a discharge without a "determination" of the "risk of injury to the national security" that an employee's retention would create.

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[7]In response to a motion by the Immigration and Naturalization Service "for clarification", filed after the litigation was brought in the Ninth Circuit (Supp. R. 19-20), the Board of Immigration Appeals issued a "supplemental decision" which ordered "that no change be made in [its] prior orders" but which added boilerplate language that "upon full consideration of all of the evidence . . . we held that upon the merits and as a matter of discretion the respondents had not made a case of persecution". (Supp. R. 4-5) Lest it be urged that this addition meets the need for findings and an opinion, attention is directed to the earlier and "unchanged" Board decision which "found no error on the part of the special inquiry officer [by reason of] the fact that [he] did not express an 'opinion' as to whether the respondent would be subject to persecution . . . because the Attorney General or his delegate is empowered to deny the application in the exercise of discretion" (R. 4-5).

While it may be true that the determination need not be cast in a particular form (cf. *United States ex rel. Dolenz v. Shaughnessy*, 200 F.2d 288 (2nd Cir. 1952), cert. denied, 345 U.S. 928 (1953), the requirement is firmly settled, even where there are no statutory requirements for findings (cf. 8 U.S.C. 156, 64 Stat. 1010) (see *City of Yonkers v. United States*, 320 U.S. 685 (1943) (dissenting opinion, J. Frankfurter, at 694), of the need for findings because "We must know what a decision means before the duty becomes ours to say whether it is right or wrong". *United States v. Chicago, M., St. P., and P.R. R.R. Co.*, 294 U.S. 499, 511 (1934).

The rule adopted by the Board of Immigration Appeals here—that an "opinion" by the Attorney General as to the likelihood of persecution is not required because the grant involved is discretionary—deserves review by this Court because of its application to all cases before that Board which involve not only the grant of the relief afforded by 8 U.S.C. 1253(h), but all other forms of discretionary relief. See *Silvo v. Carter*, 326 F.2d 315, 320 (9th Cir. 1963), which the Board invokes to support its rule (R. 5).

CONCLUSION

For the reasons advanced, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHENG FU SHENG, *Petitioner,* vs. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 22,055
LIN FU MEI, *Petitioner,* vs. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 22,056

[September 3, 1968]

On Petition for Review of an Order of the Immigration and Naturalization Service

Before: HAMLIN and MERRILL, Circuit Judges, and WHELAN, District Judge

Per Curiam:

Both petitioners seek review of an order of the Immigration and Naturalization Service, entered May 3, 1968, denying discretionary relief under § 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), and the withholding of deportation to the Republic of China in Formosa under § 243(h) of the Act, 8 U.S.C. § 1253(h).

Their claim to the Service was that they would, if returned to Formosa, be persecuted for their political opinions. The Service refuted their claims and the testimony of their expert witnesses with a letter from the State Department stating in effect that on the basis of information available it was not considered likely that the petitioners would be subjected to political persecution if deported to Formosa, but that they might well be prosecuted for violation of the Armed Forces Criminal Code of the Republic of China. The Board of Immigration Appeals found on the record that the evidence "does not sustain a finding of persecution within § 243(h), either upon the merits or as a matter of discretion." The record sustains that holding. *Kasravi v. INS*, ... F.2d ..... (9th Cir. July 23, 1968); *Hosseinmardi v. INS*, 391 F.2d 914 (9th Cir. 1968).

Other than the claim of persecution no showing of hardship was made to support a claim for discretionary relief under § 244(a)(1).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

CHENG FU SHENG,
Petitioner

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 22,055
JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered: Sept. 3, 1968

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LIN FU MEI,
Petitioner

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 22,056
JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered: Sept. 3, 1968

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

Files: A-10491862 - San Francisco May 3, 1968
A-8922627

In re: CHENG, FU SHENG
LIN, FU MEI

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Robert S. Bixby, Esq.
Fallon, Hargreaves & Bixby
559 Washington Street
San Francisco, Calif. 94111

DEPORTABLE: Act of May 26, 1924 - Accredited official of foreign government - remained in the United States after having failed to maintain exempt status in which admitted (CHENG FU SHENG)

Section 241(a)(9), I&N Act (8 USC 1251 (a)(9)) - Nonimmigrant, foreign government official (Section 101(a)(15)(A)(ii), I&N Act) - failed to comply with conditions of status (LIN FU MEI)

The case comes forward on motion of the Service that the Board clarify the scope of its rulings of July 11, 1967 and July 21, 1967 in these two cases.[1]

The facts are fully set forth in our prior orders. Briefly, Cheng, a native of the mainland of China and citizen of the

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[1] It is assumed since the cases are before us, that the Court of Appeals for the 9th Circuit, (Cheng Fu Sheng, No. 22055 and Lin Fu Mei, No. 22056 v. I&N Service) released these cases in accordance with the motion filed by the United States Attorney on February 19, 1968.

Republic of China on Formosa, last entered the United States through the port of Honolulu, Hawaii on June 9, 1952 and was admitted under the provisions of Section 3(1) of the Immigration Act of 1924, as amended, as a nonimmigrant government official, a captain in the Chinese Nationalist Air Force, coming to the United States for advanced military training. He resigned his commission in the Chinese Air Force in October of 1952 when his military unit returned to Formosa and has remained in the United States without authority since that date. He concedes deportability on the charge stated in the warrant of arrest.

The respondent, Lin, is a native of the mainland of China and a citizen of the Republic of China on Formosa, married, who last entered the United States through the port of Honolulu, Hawaii on February 12, 1953. He was admitted under Section 101(a)(15)(A)(ii) as an accredited official of a foreign government, a first lieutenant in the Chinese Nationalist Air Force, coming to the United States for 11 weeks of advanced pilot training under the Mutual Defense Assistance Program of Nationalist China and the United States. Upon the completion of the training program the respondent refused to return to Formosa with his unit. Deportability is conceded.

The respondents made application for discretionary relief pursuant to Section 244(a)(1) of the Immigration and Nationality Act and for withholding of deportation to the Republic of China on Formosa pursuant to Section 243(h) of the Immigration and Nationality Act, as amended. The special inquiry officer concluded that in the absence of the most appealing equities it would be inconsistent with our Mutual Defense Assistance Program with Nationalist China to grant the respondent the requested relief. The special inquiry officer relied upon our prior decision in *Matter of Liao*, 11 I&N Dec. 113 (Int. Dec. 1446) and upon our prior order of March 29, 1965 to deny the requested relief. The reference to these decisions, particularly *Matter of Liao*, necessarily incorporates those cases in our decision.

In *Matter of Liao*, which is on all fours with the instant case of Cheng, the question there presented insofar as statutory eligibility for suspension of deportation was concerned, was whether the respondent could support a claim of "extreme hardship" by relying upon factors which were concerned with his conduct as an officer in the Chinese Air Force and the fact that he expressed political views which were not looked upon with favor by the Nationalist Government of China. In *Matter of Liao* we were of the opinion that the political aspect of this case bore no relation to a determination of "extreme hardship" under Section 244(a)(1). We noted that Liao, like Cheng, had no relatives in the United States and that the evidence concerned with the respondents' economic well being did not support a claim that his return to Formosa would result in extreme hardship to him within the meaning of the statute. We concluded that there were no substantial equities in Cheng's case other than those arising from the fact that he refused to return to the country of his nationality after completing the program of military training for which he entered the United States, that this factor alone was insufficient to support a finding of "extreme hardship" within the meaning of Section 244(a)(1), and found the respondent statutorily ineligible for suspension of deportation.

In the Lin case in March 1965 we adjusted the respondent's status to that of a permanent resident alien on the ground that it would be inhumane to require his departure in view of the mental condition of his citizen wife. However at a reopened hearing it was subsequently established that the respondent's mentally ill wife escaped from the hospital sometime prior to September 16, 1964; that she was admitted to the Dammasch State Hospital at Wilsonville, Oregon on September 16, 1964 and that she escaped from that hospital on October 29, 1964. The hospital records show that the final diagnosis for her was "schizophrenic reaction, paranoid type." We agreed with the special inquiry officer that the respondent's case no longer presented the compel-

ling factors which motivated our grant of relief under Section 245 in March 1965 inasmuch as it appears that the respondent had neither seen nor heard from his wife for more than two and one-half years; that the respondent had made no contribution to his wife's support or hospitalization since March 1964; that it was the respondent's belief that his wife would never return to him because of her conviction that he would again have her committed to a mental institution. We affirmed the denial of Lin's application for permanent resident status in the exercise of discretion.

Section 243(h) of the Immigration and Nationality Act authorizes the Attorney General to withhold the deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion. We stated that this permissive language meant that the Attorney General or a delegate might consider factors other than those directly relating to an alien's claim of persecution in forming an opinion as to whether discretion should be exercised in favor of, or contrary to, the applicant's application for relief. Upon a full consideration of all the evidence, including a claim that the respondents would be punished as defectors, which was refuted by evidence presented by the Service from the State Department that it was not considered likely that the respondents would be subject to persecution if deported to Taiwan but might be subject to legal prosecution for violation of the Armed Forces Criminal Code of the Republic of China, we held that upon the merits and as a matter of discretion the respondents had not made a case of persecution within the meaning of Section 243(h) if they were to be returned to Formosa.

We held in *Matter of Liao,* 11 I&N Dec. 113, that prosecution before a military tribunal convened pursuant to the laws of a foreign state to try offenses committed by a member of the military forces of that country cannot be construed to be persecution within the meaning of Section 243(h) of the Immigration and Nationality Act, citing *Chao-*

Ling Wang v. Pilliod, 285 F.2d 517, 520 (7th Cir. 1960). We found no error as a matter of law that the special inquiry officer's decision rested to some degree upon a political consideration, namely, the foreign policy of the United States. The special inquiry officer exercised his discretion after affording the respondent a fair opportunity to present his case.

In the instant cases we find that the evidence of record does not sustain a finding of persecution within Section 243(h) either upon the merits or as a matter of discretion. The claim of persecution for violation of the laws of a foreign state cannot be construed to be persecution within the meaning of Section 243(h) of the Immigration and Nationality Act. Mention was made in passing of the foreign policy of the United States, of which administrative notice was taken as a matter of common knowledge of the Mutual Defense Assistance Program with Nationalist China. However, upon a full consideration of the case, we came to the conclusion (or opinion) that there was no showing of persecution on account of race, religion or political opinion, either upon the merits or as a matter of discretion.

It is believed that our supplemental decision satisfies the motion for clarification.

ORDER: It is ordered that no change be made in our prior orders entered in these cases on July 11, 1967 and July 21, 1967.

Thos. G. Finucane
Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-10491862 - San Francisco July 11, 1967

In re: CHENG, FU SHENG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert S. Bixby, Esq.
Fallon, Hargreaves & Bixby
559 Washington Street
San Francisco, Calif. 94111
(Counsel waived oral argument and filed brief in lieu thereof)

CHARGES:

Warrant: Act of May 26, 1924 - Accredited official of foreign government - remained in the United States after having failed to maintain exempt status in which admitted

Lodged: None

APPLICATION: Suspension of deportation - Section 244(a)(1), I&N Act, as amended; otherwise temporary withholding of deportation to Republic of China (on Formosa) - Section 243(h), I&N Act, as amended

The respondent, a native of the mainland of China and a citizen of the Republic of China on Formosa, appeals from an order entered by the special inquiry officer on April 20, 1967 directing his deportation to the Republic of China on the charge stated in the warrant of arrest. Applications for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act and for temporary withholding of deportation to the Republic of China on Formosa pursuant to Section 243(h) of the Immigration and Nationality Act, as amended, were denied. The appeal is

directed to the denial of the applications for discretionary relief.

The respondent last entered the United States through the port of Honolulu, Hawaii on June 9, 1952. He was admitted under the provisions of Section 3(1) of the Immigration Act of 1924, as amended, as a nonimmigrant government official, to wit, Captain in the Chinese Nationalist Air Force coming to the United States for advanced military training. The respondent testified that he resigned his commission in the Chinese Air Force in October of 1952 when his military unit returned to Formosa. He has remained in the United States without authority since October of 1952, and concedes that he is deportable on the charge stated in the warrant of arrest.

This proceeding had its inception on December 23, 1952 by issuance and service of a warrant of arrest. It has been before this Board on several occasions. We dismissed the respondent's appeal from an order entered by the special inquiry officer on October 30, 1964 directing his deportation to the Republic of China on Formosa and denied his application for discretionary relief under Sections 244(a)(1) and 243(h) of the Immigration and Nationality Act (8 USC 1254(a)(1) and 1253(h)), on March 29, 1965. A motion to reconsider our order of March 29, 1965 was denied by this Board on May 6, 1965. Pursuant to a stipulation approved by the United States Court of Appeals for the Ninth Circuit, we ordered the hearing reopened for further proceedings in light of the amendment of Section 243(h) of the Immigration and Nationality Act which became effective on December 1, 1965 (P.L. 89-236). The respondent was accorded reopened hearings on March 25, 1966, May 10, 1966 and December 2, 1966.

The evidence adduced during the reopened hearings is fully discussed in the opinion of the special inquiry officer. The respondent maintains that in addition to his liability for punishment as an officer who has deserted the Chinese Nationalist Air Force, he will also be persecuted because of

his political opinions inasmuch as he has been classed as a political defector for his opposition to the Nationalist regime while residing in the United States. He supports his claim with the testimony of an expert witness and copies of five articles by her. The respondent also requested the special inquiry officer to consider the testimony of one Liao Ding Ying (A-11828875) which was given at a reopened hearing on March 30, 1966. The Service refutes the respondent's claim and the testimony of his expert witness with a letter from the State Department which states in effect that on the basis of information available it was not considered likely that the respondent would be subjected to persecution if deported to Taiwan, but might be subject to legal prosecution for violation of the Armed Forces Criminal Code of the Republic of China (Ex. 27).

The special inquiry officer concluded that in the absence of the most appealing equities it would be inconsistent with our Mutual Defense Assistance Program with Nationalist China to grant the respondent relief under Section 243(h), as amended. He denied relief under both Sections 243(h) and 244(a)(1) in the exercise of discretion. The special inquiry officer also denied counsel's request that he make a specific finding on whether the respondent would suffer persecution if deported to Formosa. The special inquiry officer relies on the Board's decision in *Matter of Liao,* Int. Dec. 1446 (BIA, March 26, 1965) and our decision in the instant case rendered on March 29, 1965.

Counsel maintains that improper standards were applied by the special inquiry officer in denying the respondent's applications for relief under both Sections 244(a)(1) and 243(h), as amended. He argues that the special inquiry officer improperly assumed the function of ascertaining the national policy and interests of the United States as there is neither express nor implied authority vested in him by the immigration laws or any regulations made thereunder which grants such authority nor does he possess administrative expertise or special knowledge regarding the subject.

We find no merit to counsel's argument. The Attorney General "is *authorized* to withhold deportation of any alien within the United States . . . (when) . . . *in his opinion* the alien would be subject to persecution on account of race, religion or political opinion." (Emphasis supplied.) This permissive language means that the Attorney General or his delegate may consider factors other than those directly related to an alien's claim of persecution in forming an opinion as to whether discretion should be exercised in favor of, or contrary to, the alien's application for relief. The special inquiry officer in this instance merely took administrative notice of a factor which is common knowledge to all who are aware of our Mutual Defense Assistance Program with Nationalist China. We agree with the special inquiry officer that it would be inconsistent with the purpose of this program to grant relief in respondent's case.

Counsel also urges error in that the special inquiry officer failed to consider the relevant evidence and form "an opinion" as to whether the respondent would be subject to persecution on account of race, religion or political opinion if he were deported to Formosa. We answered a similar claim of counsel in *Matter of Liao,* Int. Dec. 1446 (BIA, March 26, 1965). We found no error on the part of the special inquiry officer. The fact that the special inquiry officer did not express "an opinion" as to whether the respondent would be subject to persecution if deported to Formosa is not error because the Attorney General or his delegate is empowered to deny the application in the exercise of discretion. Cf. *Silvo v. Carter,* 326 F.2d 315, 320 (C.A. 9, 1963).

We affirm the order entered by the special inquiry officer and will dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane
Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-8922627 - San Francisco July 21, 1967

In re: LIN, FU MEI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert S. Bixby, Esq.
Fallon, Hargreaves & Bixby
559 Washington Street
San Francisco, Calif. 94111
(Counsel waived oral argument and submitted brief in lieu thereof)

CHARGES:

Order: Section 241(a)(9), I&N Act (8 USC 1251(a)(9)) - Nonimmigrant, foreign government official (Section 101(a)(15)(A)(ii), I&N Act) - failed to comply with conditions of status

Lodged: None

APPLICATION: Status as permanent resident - Section 245, I&N Act; otherwise suspension of deportation - Section 244(a)(1), I&N Act, as amended; otherwise temporary withholding of deportation to Republic of China on Formosa - Section 243(h), I&N Act, as amended

The respondent, a native of the mainland of China and a citizen of the Republic of China on Formosa, appeals from an order entered by the special inquiry officer on April 27, 1967 directing his deportation to the Republic of China on the charge stated in the warrant of arrest issued on November 29, 1954. Applications for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, for permanent resident status pursuant to

the provisoins of Section 245 of the same Act and for a temporary withholding of his deportation to the Republic of China under Section 243(h) of the said Act, as amended, were denied. The appeal is directed to the denial of the applications for discretionary relief.

The respondent, a married male alien, 43 years of age, last entered the United States through the port of Honolulu, Hawaii on February 12, 1953. He was admitted under Section 101(a)(15)(A)(ii) as an accredited official of a foreign government, to wit, a first lieutenant in the Chinese Nationalist Air Force coming to the United States for 11 weeks of advanced pilot training under the Mutual Defense Assistance Program of Nationalist China and the United States. Upon the completion of the training program the respondent refused to return to Formosa with his unit. The evidence of record affirmatively establishes the respondent's deportability on the charge set forth in the warrant of arrest and it is conceded by counsel of record.

An order entered by the Board of Immigration Appeals in this case on March 29, 1965 grants the respondent's application for an adjustment of status to that of a permanent resident alien under Section 245 of the Immigration and Nationality Act. An outstanding order and warrant of deportation were withdrawn. Thereafter, the Immigration Service moved for a reopening and remanding of the proceedings for the purpose of introducing new and additional evidence pertinent to the issue of the adjustment of the respondent's status to that of a lawful permanent resident alien. The Board granted the motion in an order entered on August 12, 1965. The respondent was accorded reopened hearings on September 24, 1965, April 5, 1966 and December 2, 1966. The respondent, during the reopened hearings, renewed his applications for relief under Sections 243(h), 245, and 244(a)(1) of the Immigration and Nationality Act.

When the case was before us in March of 1965, we adjusted the respondent's status to that of a permanent resident alien on the ground that it would be inhumane to

require his departure in view of the mental condition of his citizen wife. The evidence before us at that time established that the respondent married a citizen of the United States on July 23, 1962; that they lived together as husband and wife until March or April of 1964 when she was committed to a mental institution; that the prognosis for her recovery was good and that the respondent intended to provide a home for his wife when she was released from the institution. We were of the opinion that in view of the mental condition of the respondent's wife it would be inhumane to require his departure notwithstanding the fact that the Nationalist Government of China was interested in having the respondent return to Formosa to answer for his desertion of the Chinese Air Force. Our action was supported by a decision of the Immigration Service entered as Exhibit 12 which concerned a member of the Chinese Marine Corps who entered the United States in 1952 for the purpose of receiving military training under the provisions of the Mutual Defense Program and who refused to return to Formosa upon the completion of the program. The alien married a citizen of the United States in February of 1961 and a child was born of the union on October 30, 1961. The Service concluded that in view of the family situation the favorable factors out weighed the unfavorable and granted the application in the exercise of administrative discretion. We found nothing in the record then before us to distinguish the respondent's case from that in which relief had been granted by the Service (*Matter of Hsuan Wei*, A-10427954, May 10, 1963, unreported).

The evidence adduced during the reopened hearings established that the respondent's mentally ill wife escaped from Napa State Hospital at Napa, California sometime prior to September 16, 1964; that on September 14, 1964 a notice of mental illness was filed against the respondent's wife in the Circuit Court of the State of Oregon at Portland; that she was committed to the Dammasch State Hospital at Wilsonville, Oregon on September 16, 1964 and that she

escaped from that hospital on October 29, 1964. The records of the Dammasch State Hospital show that the final diagnosis for the respondent's wife was "schizophrenic reaction, paranoid type" (Ex. 18).

The respondent testified that he had not heard from or seen his citizen wife since she escaped from the Dammasch State Hospital other than having received a baggage check for baggage she had left at a San Francisco bus depot. According to the record the respondent has not seen or heard from his wife since October of 1964.

This Board granted the respondent an adjustment of his status in March of 1965 upon a showing that the prognosis for his wife's recovery was good and that it would be inhumane to deport him when there was a good prospect that she would return to the family domicile in the near future. The evidence now before us establishes that the respondent's wife is seriously ill; that the respondent has neither seen or heard from her for more than two and one-half years; that the respondent has made no contribution to his wife's support or hospitalization since March of 1964; that it is the respondent's belief that his wife will never return to him because of her conviction that he will again have her committed to a mental institution.

We agree with the special inquiry officer that the respondent's case no longer presents the compelling factors which motivated our grant of relief under Section 245 in March of 1965. We affirm the denial of the respondent's application for permanent resident status in the exercise of discretion.

The respondent seeks relief from deportation by way of suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act and by a temporary withholding of his deportation to the Republic of China on Formosa pursuant to Section 243(h) of the Immigration and Nationality Act, as amended. The special inquiry officer denied relief under both Sections 243(h) and 244(a)(1) in the exercise of discretion. He concluded that in the absence of the most appealing equities it would be inconsistent with

our Mutual Defense Assistant Program with Nationalist China to grant the respondent relief from deportation.

The evidence adduced during the reopened hearings on these issues is fully discussed in the opinion of the special inquiry officer and will not be repeated. The respondent maintains that in addition to his liability for punishment as an officer who has deserted the Chinese Nationalist Air Force, he will also be persecuted because of his political opinions inasmuch as he has been classed as a political defector for his opposition to the Nationalist regime while residing in the United States. The respondent supports his claim with the testimony of an expert witness which was given in a companion case (*Matter of Cheng Fu Sheng* (A-10491862)) and copies of five articles written by the expert witness. The respondent also requested the special inquiry officer to consider the testimony of one *Liao Ding Ying* (A-11828875) which was given at a reopened hearing on March 30, 1966. The Immigration Service refutes the respondent's claim and the testimony of his expert witness with a letter from the State Department which states in effect that on the basis of information available it was not considered likely that the respondent would be subjected to persecution if deported to Taiwan, but might be subject to legal prosecution for violation of the Armed Forces Criminal Code of the Republic of China.

Counsel's assignments of error parallel those offered in the case of *Matter of Cheng*, A-10491862, which was decided by this Board on July 11, 1967. Counsel maintains that improper standards were applied by the special inquiry officer in denying the respondent's application for relief under both Sections 244(a)(1) and 243(h), as amended. He argues that the special inquiry officer improperly assumed the function of ascertaining the national policy and interest of the United States as there is neither expressed or implied authority vested in him by the immigration laws or any regulations made thereunder which grants such authority nor does he possess administrative expertise or special knowledge regarding the subject.

We found no merit to counsel's argument. We said in the *Cheng* case (supra) that the Attorney General "is *authorized* to withhold deportation of any alien within the United States . . . (when) . . . *in his opinion* the alien would be subject to persecution on account of race, religion or political opinion." (Emphasis supplied.) This permissive language means that the Attorney General or his delegate may consider factors other than those directly related to an alien's claim of persecution in forming an opinion as to whether discretion should be exercised in favor of, or contrary to the alien's application for relief. The special inquiry officer, in this instance, merely took administrative notice of a factor which is common knowledge to all who are aware of our Mutual Defense Assistant Program with Nationalist China. We agreed with the special inquiry officer that it would be inconsistent with the purpose of this program to grant relief in respondent's case.

Counsel also argues in the case now before us as he did in the *Cheng* (supra) that the special inquiry officer failed to consider the relevant evidence and form "an opinion" as to whether the respondent would be subject to persecution on account of race, religion or political opinion if he were deported to Formosa. We answered a similar argument of counsel in *Matter of Liao*, Int. Dec. 1446 (BIA, March 26, 1965). We found no error on the part of the special inquiry officer. The fact that the special inquiry officer did not express "an opinion" as to whether the respondent would be subject to persecution if deported to Formosa is not error because the Attorney General or his delegate is empowered to deny the application in the exercise of discretion. Cf. *Silvo v. Carter*, 326 F.2d 315, 320 (C.A. 9, 1963).

We agree with the special inquiry officer that there are no compelling equities in the respondent's case which would warrant subordinating our national interest in his favor. We affirm the decision and order entered by him and will dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane
Chairman

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEHZAD KASRAVI, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 21,966

[July 23, 1968]

Petition for Review of Deportation Order.

Before: BARNES, MERRILL, Circuit Judges, and CURTIS, District Judge

CURTIS, District Judge:

This is an appeal from a decision of the Immigration and Naturalization Board of Appeals. Jurisdiction is based upon Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105(a).

Behzad Kasravi is a citizen of Iran. He entered this country on a student visa in 1954 and has remained in the United States continually with the exception of a one day excursion to Tijuana, Mexico. He ceased being a student in 1959 and has been employed at various jobs since that time. He has been in this country unlawfully since 1961, and his deportability is conceded.

At the deportation proceedings held before a special inquiry officer, Kasravi made a number of requests for discretionary relief. Those relevant here were for suspension of deportation as authorized by § 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a) and withholding of deportation as authorized by § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h).

The special inquiry officer denied the application for suspension of deportation on the ground that Kasravi was "not statutorily eligible for that relief since he has failed to establish that he would suffer extreme hardship if required to depart from the United States." [R. 28]

The special inquiry officer similarly denied the petitioner's request for withholding of deportation, finding that he was "not statutorily eligible for relief under Section 243(h) . . . ." [R. 36]

The decisions of the special inquiry officer were appealed to the Board of Immigration Appeals. There, both findings of ineligibility were affirmed. [R. 4, 7] The petitioner has brought an appeal here.

Petitioner is a 38 year old male. He is single and has no strong family ties in the United States. He has attended college here in the United States where he majored in cinema, although he did not obtain a degree. He has worked as a film editor, a free lance photographer, an employee in a photo lab, and as a bank teller. He is intelligent and healthy. He has offered testimony that for various reasons he would not be able to obtain work in the film industry or a related area in Iran. Even if this is accepted as true, it shows no more than economic disadvantage. It is not claimed that the petitioner would be unable to obtain any employment. Economic detriment alone is not enough to qualify for relief under § 244(a). *Kwang Shick Myung v. Immigration and Naturalization Service*, 368 F.2d 330 (7th Cir. 1966); see also, AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES, 1964 Supp. p. 132 (2d Ed. 1961). This part of the Board's decision is, therefore, affirmed.

Petitioner contends that the special inquiry officer erred in finding that he was not "statutorily eligible" for relief under § 243(h). In support of this contention he has offered in evidence a large volume of printed material tending to show that the Shah of Iran is a dictator, that there exists in the country of Iran a secret police organization unrestrained by judicial powers in suppressing undesirable ideas and those who express them, that torture and arbitrary punishment are not unheard of, that those who oppose the Shah's regime may be dealt with summarily, that he, the petitioner, has been vociferous and vehement in his criticism of the Shah here in the United States, and that his very

vocal and active opposition to the Shah has been made known to the Shah or other Iranian officials by virtue of the publicity he has received. Kasravi maintains that if he is returned to Iran, he will be subject to persecution, imprisonment and possibly death for his opposition to the Shah.

His position is strongly supported by two expert witnesses, each of whom have impressive qualifications.

The only evidence offered in opposition to Kasravi's petition is rather a perfunctory letter written by a State Department official concluding generally that an Iranian student would not in all likelihood be persecuted for activities in the United States. Not only does this letter lack persuasiveness, but the competency of State Department letters in matters of this kind is highly questionable.[1]

By finding that the petitioner is not "statutorily eligible" for relief it might appear that the special inquiry officer was making a finding of fact based upon an evaluation of the record before him. If such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such finding were supported by reasonable, substantial and probative evidence. Title 8 U.S.C. § 1105 (a)(4). However, Congress has made it abundantly clear by the express wording of the statute[2] that no such finding is contemplated or required. It left to the broad discretion of the Attorney General the authority to suspend deportation in such cases and the questions of both eligibility and merit (if there be a differ-

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[1]Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.

[2]Title 8 U.S.C. § 1253(h). "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in *which in his opinion* the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time *as he deems to be necessary* for such reason." (Emphasis added)

ence) are part and parcel of this administrative determination. The scope of our review, therefore, does not permit this Court to substitute its opinion for that of the Attorney General.[3]

This position was first taken by this Court in *Namkung v. Boyd*, 226 F.2d 385 at 388 (9th Cir. 1955) in which this Court adopted the rule laid down in *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 at 394 (2nd Cir. 1953), wherein that Court said:

> "That section [Title 8 U.S.C.A. § 1253(h) quoted above in part] modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney General to use whatever information he has. . . . Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude."

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[3]This is not to say, however, that such opinions of the Attorney General are completely beyond review. A court may surely intervene where there is an abuse of discretion, lack of procedural due process or where a finding required by the statute is unsupported by reasonable, substantial or probative evidence. *Foti v. Immigration and Naturalization Service*, 375 U. S. 217 (1963); *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2nd Cir. 1966).

This Court has recently reaffirmed its adherence to this rule in *Hosseinmardi v. Immigration and Naturalization Service,* (March 22, 1968) ..... F.2d ..... (9th Cir.) and *Asghari v. Immigration and Naturalization Service,* (May 28, 1968) ..... F.2d ..... (9th Cir.).

The Board's order is, therefore, affirmed.